MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI**	**AE 716D** **RULING** Defense Motion to Compel Discovery (Lab Reports for Fingerprint Evidence) **20 April 2020**

1. **Procedural History**. On 3 February 2020, Mr. Hawsawi moved the Commission to "compel the production of all lab reports that positively identify [his] fingerprints, and legible copies of markups suitable for independent analysis."[1] On 10 February 2020, the Government responded.[2] On 17 February 2020, Mr. Hawsawi replied.[3] On 25 February 2020, Mr. Ali (a.k.a. al Baluchi) filed a notice declining joinder, stating additional arguments, and seeking other relief.[4]

2. **Findings of Fact**. The fingerprint images provided to the Defense are materially poorer in visual quality than those routinely relied on by FBI fingerprint examiners, so as to impede independent analysis.[5]

3. **Burden of Proof.** As the moving parties, Messrs. Hawsawi and Ali bear the burden of proving any facts prerequisite to the relief sought by a preponderance of the evidence.[6]

[1] AE 716 (MAH), Defense Motion to Compel Discovery (Lab Reports for Fingerprint Evidence), filed 3 February 2020, para. 2.
[2] AE 716A (GOV), Government Response To Defense Motion to Compel Discovery (Lab Reports for Fingerprint Evidence), filed 10 February 2020.
[3] AE 716B (MAH), (U) Defense Reply to AE 716A (Lab Reports for Fingerprint Evidence), filed 17 February 2020.
[4] AE716C (AAA), Mr. al Baluchi's Notice of Declination of Joinder and Motion to Consider Other Arguments and for Other Relief, filed 25 February 2020.
[5] Unofficial/Unauthenticated Transcript of the *US v. Khalid Shaikh Mohammad, et al.*, Motions Hearing Dated 25 September 2019 from 10:11 A.M. to 11:18 A.M. at pp. 27180-208 (hereinafter, "Transcript.")
[6] R.M.C. 905(c)(1)-(2).

4. **Oral Argument.** The Defense requests oral argument on the motion. The Government suggests that oral argument is unnecessary. In accordance with Rule for Military Commission (R.M.C.) 905(h), "[t]he military judge may, in the judge's discretion, grant the request of either party . . . to present oral argument." In this instance, the issue has been fully briefed in the written pleadings. Oral argument is not necessary to the Commission's consideration of the issues presented.[7] The Defense request for oral argument is **DENIED**.

5. **Law - Discovery**.

a. Information is discoverable if it is material to the preparation of the defense or exculpatory.[8] The Defense is also entitled to information if there is a strong indication it will play an important role in uncovering admissible evidence; assist in impeachment; corroborate testimony; or aid in witness preparation.[9] Finally, information is discoverable if it is material to sentencing.[10]

b. A "mere conclusory allegation that the requested information is material to the preparation of the defense," however, does not satisfy the Defense's burden to show "the reasonableness and materiality of the request."[11] Similarly, a "vague asserted need for potentially exculpatory evidence that might be contained" in the materials sought "does not pass muster."[12] Regarding classified information specifically, the Court of Appeals for the District of Columbia

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[7] *See also* Military Commissions Trial Judiciary Rules of Court 3.5.m. (1 September 2016).
[8] R.M.C. 701(c)(1-3), (e); *Brady v. Maryland*, 373 U.S. 83, 88 (1963). Furthermore, "[u]nder *Brady*, . . . prosecutors have an affirmative duty to search possible sources of exculpatory information, including a duty to learn of favorable evidence known to others acting on the prosecution's behalf, . . . and to cause files to be searched that are not only maintained by the prosecutor's or investigative agency's office, but also by other branches of government 'closely aligned with the prosecution.'" *United States v. Safavian*, 233 F.R.D. 12, 17 (D.D.C. 2005). Note, however, that absent "a specific request . . . that . . . explicitly identifies the desired material and is objectively limited in scope," there is no obligation for "prosecutors to search . . . unrelated files to exclude the possibility, however remote, that they contain exculpatory information." *United States v. Joseph*, 996 F.2d 36, 41 (3d Cir. 1993).
[9] *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993).
[10] R.M.C. 701(e)(3)).
[11] *United States v. Conder*, 423 F.2d 904, 910 (6th Cir. 1970) *cert. denied*, 400 U.S. 958 (1970).
[12] *United States v. Apodaca*, 287 F. Supp. 3d 21, 40 (D.D.C. 2017).

Circuit has held it "is not discoverable on a mere showing of theoretical relevance in the face of the government's classified information privilege, but . . . further requires that a defendant seeking classified information . . . is entitled only to information that is at least helpful to the defense of the accused."[13] Furthermore, the Defense must be able to sufficiently establish that the material sought in fact exists.[14] Finally, should a Defense discovery request be overbroad or otherwise objectionable, it may simply be denied; the Commission is under no obligation to amend or modify the request to render it unobjectionable.[15]

c. As in any criminal case, the Prosecution in a military commission is responsible to determine what information it must disclose in discovery.[16] "[T]he prosecutor's decision on disclosure is final. Defense counsel has no constitutional right to conduct his own search of the State's files to argue relevance."[17] It is incumbent upon the Prosecution to execute this duty faithfully, because the consequences are dire if it fails to fulfill its obligation.[18] A court may, where it finds doing so appropriate, rely on Government assurances in this regard.[19]

6. **Analysis**.

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[13] *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989) (citing *Roviaro v. United States*, 353 U.S. 53 (1957)).
[14] *United States v. Norwood*, 79 M.J. 644, 666 (N-M.Ct. Crim. App. 2019), review granted on other grounds, No. 20-0006/NA, 2020 WL 710633 (C.A.A.F. Jan. 21, 2020) (citing *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004)).
[15] *See, e.g.*, *Benham v. Rice*, 238 F.R.D. 15, 19 (D.D.C. 2006), on reconsideration in part, No. CIV.A. 03-01127, 2007 WL 8042488 (D.D.C. Sept. 14, 2007)("[I]t is not the court's function to modify plaintiff's demands so that, as revised, they are reasonable and legitimate." *Id.*)(interrogatories in civil case).
[16] R.M.C. 701(b)-(c); *United States v. Briggs*, 48 M.J. 143 (C.A.A.F. 1998); *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987).
[17] *Ritchie*, 480 U.S. at 59.
[18] *See United States v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015) (finding no abuse of discretion in military judge's dismissal with prejudice of charges due to a Prosecution discovery violation); *United States v. Bowser*, 73 M.J. 889 (A.F.Ct.Crim.App. 2014), *summarily aff'd* 74 M.J. 326 (C.A.A.F. 2015) (same).
[19] *See, e.g.*, *Apodaca*, 287 F.Supp.3d at 41 ("Based on the government's written and oral assurances, the Court is satisfied that the government has been and will remain vigilant in ensuring that it fulfills its discovery and *Brady/Giglio* obligations." *Id.* (citing *United States v. Karake*, 281 F. Supp. 2d 302, 306 (D.D.C. 2003))); *see also United States v. Brooks*, 966 F.2d 1500, 1504–05 (D.C. Cir. 1992)(noting that "cases considering demands for disclosure of files to the defense appear to have . . . regard[ed] prosecutorial review of possible *Brady* materials as normally sufficient," and that, absent specific evidence of wrongful prosecutorial withholding, such "case[s] call[] for the usual prosecutorial rather than [*in camera*] judicial examination." *Id.*).

a. In his initial motion, Mr. Hawsawi sought to compel "production of all lab reports that positively identify [his] fingerprints, and legible copies of markups suitable for independent analysis."[20] He did so because

> [a]fter an extensive search . . . through [the relevant category of discovery] documents provided, the Defense could not find all of the lab reports that would positively identify Mr. al Hawsawi's fingerprints on the evidence the Government has said it would offer at trial. Furthermore, some lab reports the Government turned over that purport to identify Mr. al Hawsawi's fingerprints on items of evidence [the Government intends to offer] are merely conclusory; they provide no analysis, and nor clear copies of the fingerprints, or markups that were actually analyzed.[21]

b. In its response, the Government averred that (1) it "ha[d] previously disclosed all lab reports that positively identify Mr. Hawsawi's fingerprints, as well as legible copies of markups suitable for independent analysis;"[22] (2) it had provided the Defense means to access and review the original evidence, and would do so again if asked;[23] and (3) specifically listed the Bates Numbers of the relevant lab reports.[24]

c. In his reply, Mr. Hawsawi acknowledged that the Government had now "identified . . . the specific lab reports that positively identify [his] fingerprints,"[25] but argued that relief was still required because of the reports' inadequacy:

> However, those reports are mainly conclusory and provide the Defense no ability to test the evidence itself[. Two of the documents provided] are mere samplings of illegible and blurred details that make the Defense's independent analysis impossible. While some blurred images of fingerprints . . . can be associated with items on the Government's . . . list of evidence it will use against Mr. al Hawsawi, others are so blurred they cannot [be].[26]

Based on the foregoing, Mr. Hawsawi "ask[ed this] Commission to compel the Government to provide the original and/or clearer legible copies."[27]

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[20] AE 716 (MAH), at p. 1.
[21] AE 716 (MAH), at p. 2.
[22] AE 716A (GOV), at p. 4.
[23] *Id.* at pp. 4-5.
[24] *Id.*
[25] AE 716B (MAH), at p. 2.
[26] *Id.*
[27] *Id.*

c. Counsel for Mr. Ali requested identical relief for his client.[28] He stated that "the fingerprint analysis markups provided by the government" regarding his client "are similarly blurry and illegible."[29] Further, he directed the Commission's attention to the 25 September 2019 testimony of a Federal Bureau of Investigation (FBI) forensic examiner, Mr. D. J. Fife. While being questioned regarding a Defense copy of one of the photos, Mr. Fife testified: (1) that while his analytical markings were visible, the specific fingerprint similarities he was noting could not be seen because of the photo's poor quality;[30] (2) that higher-quality photos are "something that's maintained;"[31] (3) that "a better quality photo," namely, "[t]he original photograph" would "exist[] within the FBI;"[32] and (4) that he presumed "digital quality photos" similar to the originals would have been provided to the Defense.[33] Counsel for Mr. Ali proffer that, "[i]n fact, the [G]overnment has not provided quality photographs sufficient for independent analysis."[34]

d. Based on the filings of the parties and testimony of Mr. Fife, the Commission finds (1) higher-quality copies than those provided the Defense are normally generated and used by FBI fingerprint examiners; and (2) the copies currently furnished the Defense are of insufficient quality to permit meaningful analysis. The Commission concludes that fingerprint reports of sufficient visual quality to permit adequate analysis (or at least equal in visual quality to those

[28] AE 716C (AAA), at p. 1 (Counsel for Mr. Ali "request[ing] the military commission compel the government to provide notice of all lab reports that positively identify [his] fingerprints, and produce legible copies of markups suitable for independent analysis." *Id*.). While styled as a notice of declination of joinder in order to comply with certain Rules of Court, the filing by Mr. Ali's Counsel did not in fact disjoin from Mr. Hawsawi's arguments; rather, he sought the same relief for his own client, and presented additional supporting argument and evidence. *Id*. (citing Change #1 to Military Commission Rules of Court, 1 September 2016 Edition, dated 2 March 2017).
[29] AE 716C (AAA), at p. 3.
[30] Transcript, p. 27200.
[31] *Id*.
[32] *Id*. at 27206.
[33] *Id*. at 27208.
[34] AE 716C (AAA), at p. 4.

available to the Government) are discoverable, and is aware of no obvious reason they could not practicably be provided. Accordingly, the Commission will direct appropriate relief.

7. **Ruling**. The motion is **GRANTED IN PART**, as described in paragraph 8 below, and otherwise **DENIED**.

8. **Order**. Not later than **1 June 2020,** the Government shall: (1) provide to counsel for each Accused a copy of any lab report positively identifying his or her client's fingerprints in connection with this case, and (2) ensure each copy provided is at least equal in visual clarity to that relied on by FBI fingerprint examiners in conducting their analyses; or (3) advise the Commission and the Defense why such versions cannot be timely made available.

So **ORDERED** this 20th day of April, 2020.

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W. SHANE COHEN, Colonel, USAF
Military Judge
Military Commissions Trial Judiciary